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1 P R O C E E D I N G S

2 (11:15 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 06-1505, Meacham versus Knolls Atomic Power
5 Laboratory.

6 Mr. Russell.

7 ORAL ARGUMENT OF KEVIN K. RUSSELL

8 ON BEHALF OF THE PETITIONERS

9 MR. RUSSELL: Mr. Chief Justice, and may it
10 please the Court:

11 This case presents a single important but
12 narrow question. Everyone agrees that under the
13 reasonable factor other than age provision of the Age
14 Discrimination in Employment Act, a business practice
15 that is reasonable is not unlawful even if it has a
16 disparate impact on older workers. The question here is
17 simply what happens in cases in which the proof on
18 reasonableness is in equipoise, which party bears the
19 risk of nonpersuasion. And on that question the statute
20 is not silent such as to leave to the courts to decide
21 for themselves what answer makes the most sense.

22 JUSTICE KENNEDY: Is there a hypothetical
23 universe where a scheme that discriminates on the basis
24 of age is reasonable, but there is another alternative
25 that doesn't discriminate on the basis of age? Is the

1 first alternative still reasonable, or does the
2 existence of a nondiscriminating alternative make it
3 unreasonable?

4 MR. RUSSELL: This Court made quite clear in
5 City of Jackson that the existence of alternatives,
6 while sufficient perhaps to satisfy Wards Cove and to
7 show a violation under Section 4(a)(2), is not
8 sufficient to show that the action is unreasonable. And
9 that's what the Court found to be the case in Smith. So
10 the standards are, in fact, quite different.

11 The reasonable factor other than age
12 provision looks at the reasonableness of the actual,
13 existing practice, and that's where the "because of age"
14 refers to the business practice there. It doesn't --

15 JUSTICE KENNEDY: If that's true, then is it
16 necessary either on the burden of production or burden
17 of persuasion aspect of the case to consider other
18 alternatives?

19 MR. RUSSELL: It is in our view necessary in
20 order to decide whether there is a --

21 JUSTICE KENNEDY: Why is it necessary in
22 light of the answer you gave me at the outset?

23 MR. RUSSELL: It is necessary in order to
24 establish whether you even get to the RFOA provision.
25 By its terms --

1 JUSTICE KENNEDY: Whether you even get to --

2 MR. RUSSELL: Even get to it, because by its
3 terms the RFOA provision only applies to conduct that is
4 otherwise prohibited by Section 4(a)(2), and the test
5 for whether something is otherwise prohibited under
6 Section 4(a)(2) is Wards Cove.

7 This Court in Smith said that language,
8 which was identical to the language Congress used to
9 describe the unlawful- employment practice in Title VII,
10 has the same meaning in both statutes. And in order to
11 establish a violation of Wards Cove, you do have to
12 often look at questions of alternatives.

13 JUSTICE GINSBURG: Mr. Russell, this is the
14 problem that I have with your double inquiry. First,
15 you decide business necessity. Then you decide
16 reasonable factor other than age. Once you determine
17 that there is no business necessity, there is a readily
18 available alternative, so what you're left with is a
19 pretext for age discrimination, what -- what function is
20 there for anything else to perform?

21 I mean, I understand the business necessity,
22 whether you have it pre-1991 or post, but I don't
23 understand putting this other test on top of it. It
24 sounds like you're making it harder for the -- for the
25 plaintiff.

1 MR. RUSSELL: Well, we think that the
2 layering of the tests arises out of the structure of the
3 statute as Congress wrote it. If this Court disagrees
4 with us, however, and thinks that there is room in the
5 statutory language to treat the language of 4(a)(2)
6 differently in some sense or to apply a different Wards
7 Cove test, then you're still left with the question of
8 who bears the burden of reasonableness.

9 And on that grounds we agree entirely with
10 the EEOC that that question is still determined by the
11 language of the statute, which makes quite clear that
12 Congress thought that this was an exception to liability
13 upon which the employer bears the burden of proof. And
14 it made that -- made that clear both by setting the RFOA
15 up as an exception to liability, which this Court has
16 long told Congress will be construed as establishing an
17 affirmative defense absent strong indications of
18 contrary legislative intent, and by sandwiching that
19 defense in the same sentence as two other affirmative
20 defenses, which would be a very strange thing to do if
21 Congress in fact intended the courts to figure out, you
22 know, one of the three is not like the others, That it's
23 intended, instead, as a modification of the definition.

24 And, third, Congress I think it -- it does,
25 and it is telling that, in defining the unlawful

1 employment practice, that is in defining the plaintiff's
2 case in chief, Congress used the same language that it
3 did in Title VII, and this Court has never construed
4 that language to require proof of unreasonableness.

5 CHIEF JUSTICE ROBERTS: Well, your friend,
6 of course, makes the point that the age discrimination
7 prohibition is narrower in scope than Title VII, that
8 there are more likely to be instances in which a
9 reasonable factor other than age came into play than
10 there would be a basis for discrimination on the basis
11 of race.

12 MR. RUSSELL: We acknowledge that. This
13 Court pointed out in Smith that Congress itself
14 recognized that there was a difference between age and
15 other kinds of discrimination; but it took that
16 difference into account not by defining the unlawful
17 employment practice differently, but by providing age
18 discrimination defendants a capacious defense that's not
19 available to any other defendant in a Federal employment
20 discrimination statute, and by in 1991 not extending the
21 modifications to Wards Cove to ADEA plaintiffs.

22 Congress already specifically addressed this
23 question of whether Wards Cove should be adjusted in
24 order to make age discrimination claims harder to prove
25 than Title VII claims, and it agreed that it should; but

1 it didn't do it in the way that Respondents suggest.
2 Instead they lowered the bar for Title VII plaintiffs
3 and left in place the Wards Cove test for age
4 discrimination.

5 JUSTICE ALITO: Isn't it a strain to say
6 that an employment practice was because of an
7 individual's age, but at the same time was based on
8 reasonable factors other than age?

9 MR. RUSSELL: Well --

10 JUSTICE ALITO: Doesn't the latter negate
11 the former or come very close to negating the former?
12 And if that's the case doesn't that suggest that it's
13 not really an affirmative defense but what's necessary
14 to show liability?

15 MR. RUSSELL: I don't think it does. We use
16 the example in our brief of a weight-lifting
17 requirement. It's quite possible for that requirement,
18 and quite likely, that it will have a disparate impact
19 on older workers because of their age. The effect will
20 be felt by workers because of their age. At the same
21 time, it is quite possible that that practice itself
22 will be entirely reasonable. And the difference is
23 between what the "because of age" refers to in the two
24 different provisions.

25 So if you look on page 3 of the blue brief,

1 you have the language of the RFOA provision, and the
2 reasonable -- the "factors other than age" refers to in
3 that case the differentiation, that is the business
4 practice itself. But if you turn to the prior page on
5 page 1A and look at the language of (a)(2), the business
6 practice, that is, the limiting, segregating, or
7 classifying, doesn't have to be because of age. There
8 wouldn't be a disparate treatment claim. Instead what
9 "because of age" refers to there is the effect of that
10 facially neutral practice. That is, the employee has to
11 show that the neutral practice deprives or tends to
12 deprive people of opportunities because of their age.

13 And the way that you do that is through the
14 first step of the Wards Cove analysis, by showing that
15 the practice falls more heavily on older workers as a
16 group, so that you can reach the conclusion that the
17 plaintiff is feeling the effect because of her age as
18 opposed to because of her sex or some other reason
19 specific to her. So it's not the fact that a showing of
20 RFOA negates the showing that a disparate impact is felt
21 because of age by the plaintiff.

22 As we were -- as I was mentioning before,
23 the language of the statute we think strongly points in
24 favor of an ordinary reading of this as an affirmative
25 defense. The Respondent's principal objection is that

1 this doesn't give adequate weight to the differences
2 between age and other forms of discrimination. But as I
3 mentioned, we -- we do think that Congress took that
4 into account in a different way, and there is, we think,
5 quite an important value here in providing Congress
6 clear rules of interpretation so that it knows when it
7 enacts statutes using a particular formulation the
8 courts will construe it in an ordinary way, absent some
9 compelling indication to the contrary.

10 We recognize, of course, in Betts that this
11 Court found such a compelling counter-indication in the
12 legislative history of that statute, and in the -- the
13 law's traditional treatment of benefits -- retirement
14 benefits and seniority rights. But Respondents can't
15 point to any kind of similar showing in this case that
16 Congress would have intended this catch-all provision to
17 mean something other than what it seems to say.

18 JUSTICE GINSBURG: The expression comes from
19 the Equal Pay Act, with a substitution. In the Equal
20 Pay Act it's "any other factor other than sex" and here
21 it's "a reasonable factor other than age." And my
22 impression is that that formulation in this Equal Pay
23 Act has been rather problematic. First, you have to
24 find there is a differential between the pay of men and
25 the pay of women, so -- and then you go to any other

1 factor other than sex.

2 Are you suggesting any different analysis
3 for the age category than for the sex category.

4 MR. RUSSELL: Well, certainly what you have
5 to show before you get to the defense is different in
6 the two statutes. They are similar in the sense that
7 neither requires proof of intentional discrimination.
8 For example, in Corning Glass Works all the plaintiffs
9 showed there was that a facially neutral practice, that
10 is paying the night shift folks more than the day shift
11 folks, resulted in women getting paid less than men for
12 the same work, and that was sufficient to shift the
13 burden over to the employer to show that it was based on
14 any other factor other than age.

15 And in here we think that it's similar, that
16 the plaintiff has to show that a neutral employment
17 practice has a disparate impact on the basis of age. We
18 think in our view, in addition, the plaintiff has to
19 make the full Wards Cove showing that would be
20 sufficient in Title VII to establish liability
21 conclusively. And at that point, then the burden does
22 shift to the employer but it's a modest burden.

23 JUSTICE KENNEDY: The burden of production,
24 of course.

25 MR. RUSSELL: Yes.

1 JUSTICE KENNEDY: And what about the burden
2 of persuasion?

3 MR. RUSSELL: The burden of persuasion as
4 well. We think that this is --

5 JUSTICE KENNEDY: Why is it that if the
6 employer has the burden of production, and I assume that
7 is satisfied by his saying, here's the plan that we
8 used, here are the factors we used, here is the reason
9 we used them. What is so difficult for the -- what is
10 the difficulty in saying that the employee then has to
11 show that that is unreasonable?

12 MR. RUSSELL: Well, we think there are some
13 difficulties, but it's ultimately I think beside the
14 point. The question is not what rule would make sense,
15 but what does the statute -- what rule does the statute
16 contemplate? And we think by phrasing the RFOA
17 provision as a traditional affirmative defense --

18 JUSTICE KENNEDY: You think the statute
19 doesn't make sense, so we don't --

20 MR. RUSSELL: I think the statute makes
21 perfect sense the way it's written, but if you
22 disagree --

23 JUSTICE GINSBURG: Your point that it's
24 sandwiched between two things that are clearly
25 affirmative defenses, BFOQ, the employer has the buried

1 of production and persuasion. And I forgot what the
2 third one --

3 MR. RUSSELL: The foreign law exception.

4 JUSTICE GINSBURG: Is also an affirmative
5 defense. So I take it your point is why should this
6 middle one be any different?

7 MR. RUSSELL: Yes, we think it would be
8 entirely odd for Congress --

9 JUSTICE KENNEDY: Well, I'm well aware of
10 the statutory format here. But what I want to ask is
11 why is it beyond the employee's means and capacity to
12 show that this is unreasonable? It seems to me that
13 that's the gravamen of this case.

14 MR. RUSSELL: I don't think it's beyond the
15 employee's means. I don't think it's an impossible
16 burden. Certainly Congress could have written the
17 statute in a way that imposed that burden on the
18 employees. We do think that it makes sense because --
19 that the factors that weigh in on the reasonableness
20 tend to be in the employer's possession and they have
21 better access to it; it makes sense for them to bear the
22 burden.

23 But ultimately our argument isn't grounded
24 on the claim that it would be impossible for Congress to
25 have imposed that burden. It's grounded on the claim

1 that the text of the statute indicates that Congress
2 made a different decision, that is it accommodated the
3 employers' interests in dealing with the special facts
4 of age discrimination differently.

5 JUSTICE KENNEDY: Well, if I find the text
6 of the statute neutral or at least not clear, then it is
7 proper for me to ask as a matter of efficiency where the
8 burden should be placed, is it not?

9 MR. RUSSELL: It is. It is. And my answer
10 is that we do think that most of the facts going to
11 reasonableness are in the employer's possession.

12 CHIEF JUSTICE ROBERTS: Well, but the facts
13 -- I mean, given discovery, that doesn't seem a very
14 compelling case. Once you require the employer to come
15 up -- in other words, the burden of production -- and
16 say, well, the reason we did it was this, then it's just
17 a matter of discovery. The plaintiff can say, oh, well,
18 then let me depose that person who is the head of, you
19 know, whatever the department. If it's for safety
20 reasons, for some reason, or training issues, well, then
21 we depose the person who is in charge of training or
22 safety and ask them those questions. And it doesn't
23 seem to me that the fact that the employer possesses the
24 information, given very liberal discovery we have, is
25 much of a factor.

1 MR. RUSSELL: Well, that's true in every
2 case in which informational disadvantages are cited as a
3 reason for putting the burden of proof on one party or
4 the other. Discovery can always mitigate that
5 disadvantage.

6 But we ultimately think, you know, if you
7 find the statute so ambiguous as to think that it's a
8 really critical consideration of what makes the most
9 sense, then you ought to defer to the judgment of the
10 EEOC on this question.

11 I would like to address if I could one
12 specific --

13 JUSTICE GINSBURG: But the argument was that
14 EEOC never spoke to disparate impact?

15 MR. RUSSELL: Well, it's certainly clear
16 that the EEOC -- what their position is, and that they
17 read their regulation as addressing disparate impact;
18 and we think that, although it's an inartfully drafted
19 regulation, by using the terms "individual claim of
20 discriminatory treatment" rather than the term of art
21 "disparate treatment," the language is broad enough to
22 bear their reading, particularly when you see that it
23 was enacted in the aftermath of a Department of Labor
24 regulation that nobody disputes addresses
25 disparate-impact cases, and it has no indication that

1 they were disavowing that position.

2 But if I could address the one other
3 objective --

4 JUSTICE ALITO: In this area of the law,
5 "treatment" and "impact" are words that have
6 tremendously different meaning. Isn't it strange to
7 argue that they used the term "treatment" when they
8 really meant "impact"?

9 MR. RUSSELL: Well, I -- I think that the
10 terms of art are "adverse impact" and "disparate
11 treatment." And so that their failure to use either one
12 of those, I think, supports the idea that they weren't
13 talking about either one specifically. I agree, it's --
14 it's a hard to read regulation.

15 But if I could turn, for a moment, to the
16 Adams Fruit objection, which is Respondent's insistence
17 that this is not the kind of question that the Court
18 should defer to an agency on. My point is simply that
19 this is a substantive question of law. It's a question
20 of whether reasonableness is an element of the unlawful
21 employment practice in section 4(a)(2), the same kind of
22 question this Court asked in Smith when it decided
23 whether discriminatory intent was an element of the
24 4(a)(2) cause of action.

25 And the -- Congress has delegated authority

1 to the EEOC to address those kinds of questions. In
2 fact, it went so far as to delegate to the authority --
3 delegate to the EEOC the authority not only to construe
4 the exceptions that are in the Act, but to create
5 additional exceptions. So I think Congress would be
6 very surprised, indeed, to find out that this is not the
7 sort of question to which it had delegated authority to
8 the EEOC to answer.

9 If I could reserve the remainder of my time.

10 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

11 Mr. Joseffer.

12 ORAL ARGUMENT OF DARYL JOSEFFER

13 ON BEHALF OF THE UNITED STATES,

14 AS AMICUS CURIAE,

15 SUPPORTING THE PETITIONERS

16 MR. JOSEFFER: Mr. Chief Justice, and may it
17 please the Court:

18 Congress enacted the ADEA against a settled
19 background rule that defendants bear the burden of
20 persuasion on affirmative defenses and other exceptions
21 to liability. And Congress made very clear in the
22 statute that the "reasonable factors other than age"
23 provision is precisely such an affirmative defense. It
24 did so first by saying that the provision applies to
25 activities that are "otherwise prohibited by subsection

1 A."

2 That has to mean that liability for
3 disparate impacts exists under subsection A without
4 regard to whether the employment practice is based on
5 reasonable factors other than age. The latter inquiry
6 is then a defense to the liability that would "otherwise
7 exist" under subsection A.

8 The second is a point that Justice Ginsburg
9 made, which is that this subsection (f)(1) lists three
10 different defenses right in a row. It appears to be
11 common ground that the other two are clearly affirmative
12 defenses as to which the employer bears the burden of
13 persuasion. And considering that all three are
14 introduced by the same "otherwise prohibited" language
15 and they are set forth in a single sentence separated
16 only by commas, there is no basis for distinguishing
17 among them.

18 Now, the defendant's main argument seems --

19 JUSTICE KENNEDY: I'm not sure that if the
20 statute contains three different conditions, three
21 different commands, that it follows that the procedural
22 implementations for all of these has to be the same.

23 Do you have any authority for that
24 proposition?

25 MR. JOSEFFER: No. I mean, it's just a

1 matter of how to interpret the particular statute. And
2 since our point here is that this is a subsection on its
3 face --

4 JUSTICE KENNEDY: If you want to say that
5 Congress was well aware of burden of persuasion, burden
6 of production problems with affirmative action, then
7 they wouldn't have drafted it this way, that's one
8 thing. I'm not sure that that's true.

9 JUSTICE SCALIA: I suppose you could appeal
10 to the maxim noscitur ex sociis, couldn't you --

11 MR. JOSEFFER: Right.

12 JUSTICE SCALIA: -- and say if it's in with
13 two other chickens, it's probably a chicken?

14 MR. JOSEFFER: Exactly. I mean, words are
15 generally known by the company they keep. And with
16 these three in a row, it would presumptively assume that
17 they are all --

18 CHIEF JUSTICE ROBERTS: These are not words.
19 They are operative provisions of law.

20 MR. JOSEFFER: Right. They are three
21 separate clauses that are set forth, introduced by the
22 same, in our view, dispositive language, which is the
23 "otherwise prohibited" phrase.

24 It's also the only way to make sense of the
25 statute as a whole, because the defendant's view seems

1 to be that "because of age" under subsection (a)(2) and
2 "reasonable factors other than age" under subsection
3 (f)(1), should essentially be conflated such that the
4 second, more specific provision is essentially
5 surplusage.

6 JUSTICE ALITO: Do you think that "based on
7 reasonable factors other than age" in the ADEA means
8 something different from because of such -- I'm sorry,
9 that the -- because of an individual's age in the ADEA
10 means something different from because of such
11 individual's race, color, religion, sex or national
12 origin?

13 MR. JOSEFFER: It modifies -- it modifies
14 something different. "Based on reasonable factors other
15 than age" modifies the underlying employment practice,
16 the differentiation. Over an (a)(2) -- and this was the
17 basis of the Court's decision in Smith in part --
18 "because of" does not modify the underlying employment
19 practice. It modifies the adverse effect of the
20 unemployment practice. In other words, the statute
21 refers to -- and this is on page 1a of the blue brief
22 appendix -- it refers to an employment practice such as
23 a classification that adversely affects an individual
24 because of that individual's age.

25 So "because of" logically modifies what

1 comes before it, which is "adverse effect." And that's
2 confirmed by the fact that the first sentence that talks
3 about the employment practices is written in the plural,
4 whereas "adverse effect" and "because of" are written in
5 the singular with respect to individual, which is
6 another point the Court made in footnote 6 in Smith.

7 And that also has to be the case because
8 disparate impact liability is not based on intent. It
9 doesn't matter why the employer draft -- has the
10 employment practice. What matters is the effect. So in
11 any disparate impact case there are two basic inquiries:
12 the first is, is there an adverse effect on the
13 protected class; and the second is, has the business
14 practice nonetheless justifiable.

15 And here Congress broke those two out.
16 Subsection (a)(2) addresses is there an adverse effect
17 on the -- on the protected class. And then in (f)(1),
18 Congress specifically addressed the justification
19 standard. That's one reason that we disagree with
20 Petitioners about their four-part test. Here Congress
21 clearly -- here the first part of Wards Cove tells us
22 whether there is an adverse effect under subsection
23 (a)(2). But then when it comes to the justification
24 step, Congress clearly said that the justification is a
25 reasonable factor other than age. So there is no need

1 to read in a different justification standard from the
2 second and third prongs of Wards Cove.

3 JUSTICE GINSBURG: The problem is that you
4 would be making this provision more generous to the
5 plaintiff than -- for example, in Title VII the defense
6 is business necessity; the employer has the burden of
7 production; the employee has the burden of persuasion.
8 Here you'd read -- you're saying you come into the
9 covered category, you were shown because of age through
10 impact, and then the burden -- the total burden is on
11 the employer.

12 Am -- am I making myself clear here?

13 MR. JOSEFFER: I think -- I think I
14 understand the question. This statute is far more
15 employer-friendly in the standard than Title VII because
16 it relies on the reasonable factors -- the
17 reasonableness defense, which is a much lower standard
18 than the business necessity test under Title VII. That
19 reflects the fact that there are more innocent
20 explanations for age disparity.

21 The separate question here, though, on
22 burden of persuasion, I think the key point there is
23 that in Wards Cove this Court only had the equivalent of
24 (a)(2) to work with. So it had not much textual basis
25 to go on with respect to the second and third factors of

1 Wards Cove and burden-shifting. The Court had to do a
2 lot of gap-filling once it recognized the disparate
3 impact claim.

4 Since then, however, in every one of these
5 related civil rights statutes that Congress has enacted,
6 it has spoken more clearly on the justification stage;
7 and has always in every one of these statutes put that
8 burden on the defendant. It did it in Equal Pay Act,
9 according to this Court's decision in Corning Glass. It
10 did it in the revised Title VII. It did it here. And
11 even in the Americans with Disabilities Act, Congress
12 specified that business necessity is a "defense."

13 CHIEF JUSTICE ROBERTS: Counsel, I was
14 surprised not to see Chevron cited in your brief. What
15 -- what sort of deference do you think we should give
16 the EEOC regulations here?

17 MR. JOSEFFER: Auer -- in our view the
18 regulation itself as far as it goes is entitled to
19 Chevron deference, because it's a notice and comment
20 rulemaking pursuant to delegated legislative authority.
21 We recognize, however, that the regulation on its face
22 is at best inartfully written; and therefore, the
23 question is how to interpret the regulation.

24 We think EEOC's interpretation of its
25 regulation in context is reasonable for a combination of

1 a few factors. First, the Department of Labor
2 contemporaneously enacted a regulation putting the
3 burden on the employer in all cases.

4 Second, when the EEOC took over rulemaking
5 authority, it didn't insert this unusual discriminatory
6 treatment language in there, but the EEOC's position at
7 that time and ever since has been that it did not intend
8 a substantive change.

9 And third, discriminatory treatment, while
10 it undoubtedly throws a real wrench in -- or wrinkle
11 into things -- excuse me -- and takes us out of Chevron
12 and into Auer, is not a term of art. Disparate
13 treatment is a term of art. The regulations otherwise
14 use the phrase "different treatment," but discriminatory
15 treatment is at best confusing, especially
16 considering --

17 CHIEF JUSTICE ROBERTS: I'm sorry. I
18 thought Auer deference tells you how to interpret the
19 regulation. And having once interpreted the regulation,
20 you need to know what to do with it.

21 MR. JOSEFFER: My understanding of Auer
22 deference is that the agency gets deference as the
23 reasonable interpretation of its regulation. And the
24 agency has consistent --

25 CHIEF JUSTICE ROBERTS: We know what the

1 regulation -- we give it deference; we know what the
2 regulation means. Now, does that regulation, as
3 understood in light of Auer deference, get Chevron
4 deference or something else?

5 MR. JOSEFFER: It would get Chevron
6 deference. I mean, I think the two-step process is the
7 regulation here, in our view, is clearly entitled to
8 Chevron deference as far as it goes. And if you defer
9 under Auer to the agency's view of its regulation, then
10 that makes the Chevron case. But it's through the lens
11 of Auer.

12 And finally, as a policy matter, Justice
13 Kennedy, one can reasonably place this burden of
14 persuasion either way. I mean this Court put it one
15 place in Wards Cove. Congress immediately abrogated
16 Wards Cove and put it in the other place. The sky is
17 not going to fall either way. But even if the text
18 wasn't so clear, one would logically put it on the
19 employer for a few reasons: First, all else being
20 equal, the employer is at least in a better decision to
21 explain the reasonableness of its very own business
22 practice.

23 And, second, the parties are not ordinarily
24 expected to prove a negative, which is what the
25 plaintiff would have to do here. And that's why in

1 every statute enacted after 1964, which is the first --

2 CHIEF JUSTICE ROBERTS: Why is it proving a
3 negative? They would just have to prove that it was or
4 was not a reasonable factor other than age.

5 MR. JOSEFFER: Right, and --

6 JUSTICE KENNEDY: Yes, and just adding on to
7 the Chief Justice, it seems the employer is the one that
8 would prove the negative. He has to say there were no
9 -- here is a whole universe of other frameworks, and
10 none of these work.

11 MR. JOSEFFER: No, it's a very simple
12 two-part test. Once the plaintiff has established an
13 adverse effect, an adverse impact -- I mean, even the
14 defendant agrees that presumptively establishes
15 liability, because the defendant agrees to bear at least
16 the burden of production at that point.

17 And the question for the employer is just to
18 show that its business practices -- own business
19 practice is reasonable, is supported by some reasonable
20 factor other than age. And it ought not be hard for an
21 employer, especially considering that the reasonableness
22 standard is not very daunting, to explain why its own
23 business practice is reasonable. And if an employer
24 can't even persuade someone that its own business
25 practice is reasonable, then the odds are that there is

1 a problem.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Waxman.

5 ORAL ARGUMENT OF SETH P. WAXMAN

6 ON BEHALF OF THE RESPONDENTS

7 MR. WAXMAN: Mr. Chief Justice, and may it
8 please the Court:

9 I want to make an argument both from
10 elegance and from function and from structure. Under
11 the employment discrimination -- a wide range of
12 employment discrimination, beginning with this Court's
13 decision in McDonnell Douglas, this Court has applied a
14 three-step balance-shifting paradigm in order to help
15 juries resolve the question of whether discrimination
16 occurred. In the disparate treatment cases there is a
17 burden -- the first step, the plaintiff has to establish
18 a prima facie case that he was the subject of disparate
19 treatment because of his race or sex.

20 The burden of production then shifts to the
21 defendant in order to explain, under disparate treatment
22 cases, a legitimate nondiscriminatory reason, which
23 eliminates the presumption consistent with Evidence Rule
24 301, and the burden of proof then resumes on the
25 plaintiff to prove discrimination because of the

1 prohibited characteristic.

2 Now, in Wards Cove, this Court looked both
3 to Rule 301 and to the paradigm in other discrimination
4 cases to apply a three-part test, in which there is a
5 burden of proof to establish a presumption, a burden of
6 production to neutralize it, and then a burden of proof
7 to show because of race.

8 The Second Circuit has done exactly that in
9 this case, and we think they are right not just because
10 that harmonizes this Court's prior discrimination cases,
11 and not just because three seems to be more elegant than
12 the four steps that the Petitioners want or the two
13 steps that the Government wants, but because it makes
14 sense.

15 And this goes directly to the question, I
16 think it was, that Justice Alito asked: Whether or not
17 the "reasonable factors other than age" inquiry is
18 simply what's necessary to show liability, that is, that
19 it was because of.

20 The ADEA doesn't prohibit disparate
21 treatment. It doesn't prohibit disparate impact. It
22 prohibits -- doesn't prohibit employment practices
23 simply because they correlate negatively with age. A
24 plaintiff has to prove that he has suffered adverse
25 employment action because of his age. And the question

1 whether an employer based its action on reasonable
2 factors other than age is part and parcel of that
3 inquiry. It's not a free-standing --

4 JUSTICE GINSBURG: Mr. Waxman, the first
5 part --

6 MR. WAXMAN: -- confession and avoidance
7 defense.

8 JUSTICE GINSBURG: The way you phrased the
9 first part, it sounded to me like you were going back to
10 the interpretation that this Court rejected, that is,
11 under the Age Discrimination Act there is only
12 differential treatment, not neutral factor with a
13 differential impact.

14 MR. WAXMAN: No, not at all. Not at all.
15 If I said that, I certainly don't want to be mistaken.
16 We are not up here arguing that there is no disparate
17 impact theory of liability under the ADEA as there is
18 under Title VII. This Court resolved that question in
19 Smith, and it resolved it in large part by reference to
20 the "reasonable factors other than age" provision, which
21 Justice Stevens' opinion for a plurality of the Court
22 explained that, when you have a disparate treatment
23 case, if the plaintiff proves that his -- his or her
24 treatment -- if the defendant proves that it was because
25 of something other than age, it isn't disparate

1 treatment.

2 The fact that there is an RFOA provision, we
3 think, does reflect the fact that there is the potential
4 for liability under disparate impact, but as this Court
5 explained, it's narrower. And it's narrower because --
6 not only because the 1991 amendments didn't apply to age
7 cases; it's narrower, because as this Court has
8 recognized in almost every age case it has decided, age
9 -- unlike race and sex and religion and national origin
10 -- often does -- sad to say by somebody who is in his
11 second decade of protection under the ADEA -- often does
12 correlate with reasonable employment factors.

13 And the fact that all -- what it means is
14 that at step one of the burden-shifting analysis, the
15 Wards Cove analysis, which in a race or sex case
16 establishes a strong presumption that the employment
17 action was because of race or sex because there are so
18 few employment characteristics that do correlate
19 negatively with one's race or one's gender, it's a
20 strong presumption which nonetheless need be met only by
21 a burden of production.

22 This Court has recognized that in the age
23 context, the presumption actually is quite weak. And it
24 would be more than perverse to adopt the Government's
25 proposal, which is that notwithstanding the much weaker

1 inference, the burden of persuasion is now on the
2 employer, not the employee. And, in fact, the principal
3 problem, I would say, with the Government the EEOC
4 proposal --

5 JUSTICE STEVENS: Mr. Waxman, what do you do
6 about the language "otherwise prohibited"?

7 MR. WAXMAN: Excuse me?

8 JUSTICE STEVENS: What do you do about that
9 language in the statute?

10 MR. WAXMAN: May I just finish my sentence
11 --

12 JUSTICE STEVENS: Sure.

13 MR. WAXMAN: -- Justice Stevens, and go
14 right to "otherwise prohibited"?

15 The government's proposal under which, once
16 the employer establishes the statistical disparity, the
17 burden of proof shifts to the employer, equates what
18 this Court has said over and over again is a prima facie
19 case or a presumption into liability. It would dictate
20 precisely the opposite result that this Court found in
21 St. Mary's Honor Center. It would allow the jury, upon
22 silence by the defendant, not to say, well, you may
23 consider this presumption to be enough if you don't hear
24 any other evidence. It would tell the jury the proof of
25 statistical disparity is proof of discrimination. And

1 that's just wrong.

2 Now, "otherwise prohibited" --

3 JUSTICE STEVENS: Even that, there's a
4 question about not merely statistical disparity, but a
5 causal connection between an identified practice --

6 MR. WAXMAN: Right.

7 JUSTICE STEVENS: -- in the disparity.

8 MR. WAXMAN: That's exactly right.

9 Now, with respect to the structure of the
10 statute and "otherwise prohibited," the -- my friends on
11 the other side of this case turn almost everything on
12 the fact that the "reasonable factors other than age"
13 provision applies in -- in subsection (f) and is -- as
14 Justice Ginsburg said -- is sandwiched in between two
15 other provisions that, for argument's sake, let's just
16 acknowledge are affirmative defenses on which the
17 employer would bear the burden of proof. And why
18 doesn't that prove anything?

19 I'll go first to "otherwise prohibited" and
20 then explain why the sandwich effect is no more
21 persuasive here than it was to the Court in Betts.

22 "Otherwise prohibited" means that it is
23 prohibited subject to the following conditions. It
24 doesn't say who bears the burden of those conditions.

25 What it reflects, Justice Stevens, is this

1 fact. You could have taken everything that is in F and
2 just put it into A, but you would then have had to put
3 it into B and C and E. And so what Congress said was --
4 it didn't say not -- things that are prohibited in
5 Section A won't be unlawful if X, Y and Z. It says
6 "otherwise prohibited" in those sections.

7 In other words, it doesn't -- it means
8 nothing other than it's prohibited subject to the
9 following conditions. Now, I will acknowledge for
10 argument's purposes -- and it actually suits my argument
11 -- to show that the BFOQ defense and the
12 foreign-employer defense are affirmative defenses.
13 Because as we -- as we know from Black's Law Dictionary
14 and this Court's decisions, Dixon, for example, an
15 affirmative defense is a defense that says: I admit the
16 allegations of the complaint, but I have a justification
17 for it that the law recognizes.

18 Now, that's --

19 JUSTICE SOUTER: Isn't it -- isn't the --
20 isn't the weak point in your argument the following:
21 Your argument assumes that when the employer implicitly
22 says I admit the allegations the complainant made, that
23 the employer is admitting, in effect, to disparate
24 treatment. That he is saying: I did it because it was
25 my purpose to discriminate against the old.

1 But if we read the "because" language as
2 also admitting the meaning, "I did it or it had an
3 impact by reason of the age, regardless of my intent,"
4 then this incongruity that you are arguing about
5 disappears.

6 MR. WAXMAN: No. It is quite to the
7 contrary, unless -- and it may be the case that I'm
8 completely misunderstanding you.

9 The point is that at step one the plaintiff
10 has to prove a statistical disparity, a substantial,
11 negative, statistical correlation. And that raises a
12 presumption that what was otherwise a neutral -- appears
13 to be a neutral factor was, in fact, because of age.
14 That these --

15 JUSTICE SOUTER: In other words, for the
16 purpose of discriminating against the old.

17 MR. WAXMAN: Whether it's --

18 JUSTICE SOUTER: And that's -- that's
19 disparate treatment.

20 MR. WAXMAN: Well, no. What this -- what
21 this Court said in Griggs is there are proof problems.
22 There are plenty of instances in which there is
23 undiscovered, unreconciled, unacknowledged inferences
24 about people. And old people is the perfect example
25 where there is no history of invidious discrimination.

1 There is no prior hurdle that, unlike black people and
2 women had to overcome -- which was another factor in
3 Griggs. It's that we all get old, and people have
4 preconceptions sometimes about the enormity of
5 limitations of age which may not be justified.

6 So the way that these defenses, the
7 sandwich, if you will, works is the plaintiff under
8 Wards Cove shows his statistical case. It's a prima
9 facie -- it shows that there is a disparate impact,
10 period. But the statute --

11 JUSTICE STEVENS: Mr. Waxman, you have to
12 keep in mind they are not just showing a disparate
13 impact. Because of a particular practice there is a
14 disparate impact. That's what you leave out. So the
15 quality of the practice is what is at issue, and the
16 defendant doesn't come in and say I admit that it was
17 unlawful. He first tries to prove it was necessary, and
18 he fails on that. And if he fails on that, he has the
19 lesser burden of proving reasonableness.

20 MR. WAXMAN: No, well let -- let me see if I
21 can't address Justice Souter's point first. I do think
22 I understand your point, which is what's wrong with the
23 Petitioner's case. But, Justice Souter, the point is
24 that once a prima facie case is established in an age
25 case -- let's just take the three provisions that are at

1 issue in (f)(1).

2 Under BFOQ, the employer gets up and says:
3 Well, ladies and gentlemen, the judge is going to tell
4 you that they have established a prima facie case that
5 the way that these otherwise neutral -- that this was
6 because of the plaintiff's age. And you know what? I
7 admit it. I, in fact, admit that it was by accident
8 because of age.

9 JUSTICE SOUTER: In an impact -- no. In an
10 impact case, he is saying: I admit that the impact
11 falls more heavily on the old.

12 MR. WAXMAN: Correct.

13 JUSTICE SOUTER: And -- and it seems to me
14 that's all he has to admit in an impact case. And he
15 does so, and then he --

16 MR. WAXMAN: What he basically says is: I
17 agree that age was the factor, but I have an excuse for
18 it. And, similarly, in the third exception, the
19 foreign-employers exception, he comes in and says: You
20 have heard all of the statistics. And you know what? I
21 did do this to disadvantage old people, because my plant
22 is in a country that discriminates -- that makes it
23 illegal for people over 65 to work. But --

24 CHIEF JUSTICE ROBERTS: But then he is
25 not -- he didn't do it to discriminate against old

1 people. He did it because the foreign country requires
2 him --

3 MR. WAXMAN: That's correct. And that's why
4 I admit -- I admit that I did this in a way that had a
5 disparate impact on old people. I did it, if you will,
6 in order to -- I have a justification for it. Whereas,
7 in the reasonable factors other than age, the assertion
8 is everybody understands that the plaintiff has the
9 ultimate burden to prove that he or she suffered an
10 adverse employment action because of age, not because of
11 some factor that for entirely good reasons correlates
12 with age. And the showing that there is a statistical
13 --

14 JUSTICE SOUTER: Well, then you're -- then
15 you're just saying that there -- that there is no such
16 thing as a disparate-impact case.

17 MR. WAXMAN: No.

18 JUSTICE SOUTER: You're saying -- you're
19 saying that there's got to be a disparate-treatment
20 case.

21 MR. WAXMAN: No, no; not at all.

22 JUSTICE SOUTER: Well, then I'm not
23 following you.

24 MR. WAXMAN: Let's take their -- let's take
25 their 50-pound hypothetical. The employer says: Okay,

1 from now on all of our employees have to be able to lift
2 50 pounds over their head, you know, 10 times in 30
3 seconds. And older people or women -- let's say older
4 people, you know, say: Well, statistically, that has
5 wiped us out. That has had a substantial -- a
6 substantial adverse effect on us because we are old, and
7 we have less upper body strength.

8 The employer then gives -- comes forward
9 with a legitimate, nondiscriminatory reason or a
10 reasonable factor other than age, and says, for example,
11 well, you know, this is -- we need our employees to be
12 able to lift strong things. If the plaintiff comes back
13 and says, I am an accountant, that's not reasonable,
14 it's a very different case than if this is a requirement
15 imposed on stocking clerks in an auto parts -- auto
16 parts shop where you do have to lift very heavy things
17 over your head.

18 In other words, the paradigm that this Court
19 set out in Wards Cove applies exactly the same way. It
20 applies a three-part test except that at step three the
21 standard of justification is different.

22 And this, I think -- I hope, Justice
23 Stephens, goes to your question. In Wards Cove this
24 Court said you show a prima facie case of a disparate
25 impact. The burden then -- the burden of production

1 then shifts to the employer to explain that it was --
2 there is a business -- to articulate a business
3 justification for the facially neutral requirement.

4 And what the plaintiff then has to do is
5 bear the burden of proving that that wasn't a business
6 necessity; that there is one other way, one other way in
7 which it could have been done; and, therefore --

8 JUSTICE KENNEDY: But you there agree that
9 there is a distinction between "business necessity" and
10 "business reasonableness"?

11 MR. WAXMAN: Yes. And, in fact, I think
12 it's sort of embedded in the very opening of the blue
13 brief in this case, where the Petitioner says: Well,
14 the Court has sometimes used the word "business
15 justification," and the Court has sometimes used the
16 word "business necessity," and we don't really think
17 that means anything, so we use the words
18 interchangeably.

19 But this case shows that it means everything
20 because at step three of Wards Cove the petitioner --
21 the plaintiff's burden is proving that it is -- that
22 there is one other way -- that all you have to show is
23 that it wasn't a necessity to do it that way in order to
24 achieve your objective and the employee wins.

25 But because of the differential in

1 correlation between age and employment factors, in this
2 case it is a business justification; that is, the
3 employee has to come in and say it just wasn't
4 reasonable to use that.

5 And this case is a perfect example. Here we
6 have a research lab that has one client. It's the
7 nuclear reactor division of the United States submarine
8 unit. And they come, and they say -- and there is no
9 dispute about the facts here -- they say the Cold War is
10 over. We aren't going to have as much work for you.
11 And since you're cost-plus, you're going to have to
12 reduce your work force; and because we are in a
13 different kind of war, we have new missions. You are
14 going to have to design and engineer and implement
15 things that you hadn't done it before. And so you need
16 to figure out a way to go ahead and do this.

17 And what the company did was to go through
18 all of its units and then subunits and sections, and
19 say: Given the new mission that the Navy has told us we
20 are going to have to occupy, do you have people -- do
21 you have more people than you're going to get paid for
22 to do what you have to do?

23 If the answer is yes -- if the answer is no,
24 you're fine. If the answer is yes, please consider the
25 following: What are the skills within the people within

1 your section, subsection, or unit that are excess, that
2 in light of the reduced and changed mission we don't
3 need? Identify those skills. Then go through each one
4 of your employees; and if it is an employee with that
5 skill, rank them on a scale of 1 to 10 according to four
6 different characteristics: Seniority, which gives a
7 benefit to older workers; recent job-performance
8 ratings; the criticality of the other skills they have,
9 do they have some other skill that is going to be
10 required; and their flexibility -- how willing have they
11 been, or are they, to learn new skills?

12 And the company has a training manual. It
13 goes through and trains the managers to do this. It is
14 approved by the Department of Energy and the Department
15 of the Navy. But after the managers engage in this
16 analysis and prepare this matrix, they then have to
17 justify it before a central review board, which the
18 plaintiff's own expert acknowledged was set up in order
19 to make the managers defend each decision and make sure
20 that those judgments corresponded with overall
21 management's responsibilities.

22 JUSTICE GINSBURG: Still, the numbers, the
23 way it came out, are rather startling. That there were
24 31 people who were RIF'd; and of those, 30 turn out to
25 be over 40.

1 MR. WAXMAN: That's correct. And as the
2 district court found and the court of appeals found,
3 those were strikingly stark numbers. They were so stark
4 that they came to the immediate attention of the
5 company's management and general counsel, Mr. Correa,
6 who was -- who looked at this and said: We are going to
7 get sued for age discrimination. What should we do
8 about this?

9 And what he did about this, what the proof
10 showed, is he went back and said: Is each one of these
11 decisions justifiable? Did they really apply these
12 factors? He testified that he considered just saying:
13 We'll go back and redo it so that the age distribution
14 comes out right. But he was concerned that the New York
15 human rights law, which defines -- this is sort of
16 astounding -- defines "older worker" as somebody over
17 18, does have a reverse-discrimination provision.

18 But the point here is -- and, therefore, he
19 decided: We did this right; we used a matrix that
20 unrebutted testimony said was the paradigm in industry.

21 JUSTICE GINSBURG: But the terms
22 "flexibility," "criticality" -- I mean the way you
23 described it, it sounds very mechanical, mathematical.
24 But those terms are -- they call for some human
25 judgment.

1 MR. WAXMAN: They definitely do. And the
2 second question that was presented in this case, which
3 the Court didn't accept, was an assertion by the
4 Petitioner that the Second Circuit had assertedly held
5 that where a reasonable factor other than age derives
6 from a subjective judgment, the Second Circuit had held
7 that it was immune from review under disparate-impact
8 theory, which, as the Government pointed out in its
9 invitation brief, is not at all what the Second Circuit
10 held.

11 The point is that this Court in Smith and
12 earlier in Hazen Paper and earlier age cases was highly
13 cognizant of the fact that unless there is a test that
14 implies that -- that applies certainty for employers,
15 there is going to be -- age -- if this standard isn't
16 reasonable and if it isn't up to the other side to prove
17 that it's unreasonable, employers are essentially going
18 to take age into account. They are going to do what
19 Mr. Correa testified he wouldn't do, which is rejigger
20 the results to come up with a -- a percentage that more
21 approximated the balance in the work force. And that,
22 this Court has said repeatedly --

23 JUSTICE GINSBURG: Well, maybe because he
24 thought that, given the subjectivity of some of these
25 factors, that there was at least unconscious age bias in

1 the decisions that were made.

2 MR. WAXMAN: Well, Justice Ginsburg, that is
3 why -- and it was testimony both from the employees in
4 the case and from our uncross-examined expert and even
5 their expert -- the review board -- the company set up a
6 central review board which was trained and which
7 examined every single manager about every single
8 decision, whether you call it subjective or objective.

9 Now, the district court -- the trial court
10 who heard the testimony said that he -- he deemed
11 flexibility and criticality objective. He said they
12 were objective factors because of all the instructions
13 that were given, which we have reprinted in the joint
14 appendix in this case. But even assuming -- and I
15 certainly take your point, Justice Ginsburg, that if you
16 ask a manager to evaluate an employee on the degree of
17 criticality of that employee's skills or the flexibility
18 of that employee, you can give her all the training in
19 the world. You can give her a 16-point checklist.
20 Ultimately, you're relying on a judgment by a human
21 being of another human being.

22 But why would we not want employers to do
23 that? Why would we want them to -- to retreat to the
24 safe harbor of some safe quota. You know, gee, we have
25 a 60/40 split in our work force; and, wow, these

1 numbers, we did it according to Hoyle. We've done --
2 this is the paradigm RIF process, but go back and do it
3 in a way that comes out with a specific set of numbers.

4 CHIEF JUSTICE ROBERTS: Counsel, is your
5 recent discussion about what happened here go simply to,
6 I guess, your alternative argument, that we should
7 affirm because you're right, regardless of who bears the
8 burden; or does it really go to the legal question
9 before us?

10 MR. WAXMAN: Well, I think it goes to both.
11 I mean it goes to -- it simply -- it certainly goes to
12 the question over whether, whoever has the burden on
13 reasonableness, you ought to do what you did in Smith
14 and what the Eleventh Circuit did in Montalvo, which is
15 the case you cited in Smith. And in --

16 JUSTICE STEVENS: Here we have a jury
17 verdict that was affirmed by the court of appeals.

18 MR. WAXMAN: Well, we have a jury verdict.
19 We have a jury verdict under Wards Cove. The court of
20 appeals, as we pointed out in -- to the court of appeals
21 the first time and in our petition for certiorari here
22 the last time and to the court of appeals the second
23 time and to this Court on pages 4, 5, and 7 of our brief
24 in opposition this time -- the court of appeals was
25 simply wrong in both step one and step three of Wards

1 Cove. This is even assuming Wards Cove were the test.
2 There is -- under step three of Wards Cove, which is how
3 this case was tried, it was concededly the plaintiff's
4 burden to prove that there was some other way, one other
5 way, to do what the company wanted that established that
6 this wasn't a business necessity. And I will represent
7 to the Court that in five and a half weeks of testimony
8 there is not one sentence of evidence to that effect.

9 JUSTICE GINSBURG: But that was taken out of
10 it by Judge Jacobs when he redid it. He said, we were
11 on the wrong track with business necessity. Business
12 necessity is out. It's only reasonable factor of age.

13 MR. WAXMAN: What Judge Jacobs said is the
14 case was tried under business necessity, under which the
15 plaintiffs at least had to prove that there was some
16 other way that the company could equally have achieved
17 its objectives.

18 JUSTICE STEVENS: Well, wasn't the issue of
19 reasonable factor under age tried in the trial court
20 when the case was tried?

21 MR. WAXMAN: No, because the EEOC regulation
22 at the time, regulation (d), which deals with
23 disparate-impact cases, said that reasonable -- the
24 reasonable factors other than age provision is proven
25 by, and only by, the business-necessity defense, a

1 defense as to which the plaintiffs bear the burden.

2 And, in fact, in Wards Cove, the Government

3 in Wards Cove was on the employer's side. The

4 Government urged the court to do exactly what it did.

5 And under the Government's own regulation 1625.7(d), the

6 burden of proving reasonable factors other than age was

7 correctly on the plaintiff, but incorrectly equated with

8 the substantive showing of business.

9 JUSTICE GINSBURG: Is that --

10 JUSTICE STEVENS: Am I correct to understand

11 that your trial counsel then took the position you must

12 prove business necessity? I mean an absence of business

13 necessity, rather than reasonableness. They didn't

14 advance their strongest defense.

15 MR. WAXMAN: Well, no, we took the position

16 that reasonable factors other than age was a separate

17 test and was a separate defense.

18 JUSTICE STEVENS: Right.

19 MR. WAXMAN: The judge instructed the jury

20 to the contrary and said under Wards Cove --

21 JUSTICE GINSBURG: Was Judge Pooler wrong,

22 then? She said, in effect: You forfeited reasonable

23 factor other than sex, because you didn't bring it up.

24 You were going on business necessity.

25 MR. WAXMAN: Well, what happened was -- I

1 mean, Judge Pooler is wrong in certain respects, but not
2 that respect. We -- our answer pleaded reasonable
3 factors other than age, but we didn't -- neither we nor
4 our opponents asked for a separate instruction on
5 reasonable factors other than age. The jury was
6 instructed on the Wards Cove analysis because --

7 JUSTICE GINSBURG: The jury didn't hear a
8 word about reasonable factors other than age. They
9 heard about business necessity.

10 MR. WAXMAN: That's correct. I mean that --
11 and that's because -- you could say that it was a mutual
12 mistake by everyone involved. But the EEOC had directed
13 under subsection (d) of its regulations that reasonable
14 factor other than age could be established only by
15 proving business necessity. And both parties --

16 JUSTICE STEVENS: As everybody now knows,
17 that was wrong.

18 MR. WAXMAN: That's correct. And the -- my
19 point is we are -- we are entitled to judgment in our
20 favor. We are entitled to an affirmance because, number
21 one, the Second Circuit was correct that the burden of
22 proving reasonableness was on them, and the -- the
23 Petitioners have acknowledged expressly on page 53 of
24 their blue brief that if in fact it is true that the
25 Second -- if the Second Circuit is in fact correct, then

1 the judgment is affirmed, that is, they say when a --
2 "While a defendant has no obligation to press an issue
3 upon which the plaintiff bears the burden of proof --
4 and therefore the Second Circuit may have been justified
5 in reviewing the evidence of reasonableness in light of
6 its holding that Petitioners bore the burden of proof"
7 --

8 JUSTICE STEVENS: But did you plead this as
9 an affirmative defense? Did you plead it as an
10 affirmative defense?

11 MR. WAXMAN: We pleaded it as a -- I can't
12 bring the complaint to mind, but we pleaded it as a
13 separately specified defense, yes. We said, in our
14 answer to the complaint, we said this is a reasonable
15 factor other than age.

16 And so we are -- everyone acknowledges that
17 if the Second Circuit is correct as to where the burden
18 applies, the judgment should be affirmed. Our
19 submission is that the judgment has to be affirmed
20 whether or not the burden applies as the Second Circuit
21 held.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Russell, you have four minutes
25 remaining.

1 REBUTTAL ARGUMENT OF KEVIN K. RUSSELL
2 ON BEHALF OF THE PETITIONERS

3 MR. RUSSELL: I'd like to begin by
4 addressing the general legal question that the Court
5 granted cert on, and particularly going back to this
6 idea, this assertion that the proof of the RFOA is
7 somehow a negation of the obligation that the plaintiff
8 has to prove that they have suffered a disparate impact
9 because of age. It is simply incorrect. It's based --
10 as, Justice Souter, I think you were suggesting in some
11 of your questions -- on a confusion about what the
12 "because of age" requirement is in a disparate-impact
13 case under Section 4(a)(2). The requirement under
14 Section 4(a)(2) is simply to show that the effect of the
15 practice is felt because of age, while the defense in
16 the RFOA provision is to show that the practice itself
17 is reasonable even though it has this effect.

18 JUSTICE ALITO: Well, the practice -- if a
19 practice correlates with a number of -- statistically
20 correlates with a number of different factors, is it
21 because of all of those factors?

22 MR. RUSSELL: I think, under Wards Cove,
23 this Court has said that it does, and so under Wards
24 Cove you establish that the discrimination is felt by
25 older workers because of age by showing that all the

1 workers as a group suffer disproportionately from it.

2 JUSTICE SOUTER: Wards Cove, in other words,
3 says "because" may mean "correlation" and it mean
4 "purpose," either one.

5 MR. RUSSELL: Yes. I mean --

6 JUSTICE SOUTER: Yes.

7 MR. RUSSELL: But I think all you have to
8 show under 4(a)(2) is that the practice tends to
9 disadvantage older workers because of their age. And so
10 again in our weight -- weight example, the employer
11 admits in our weight example that the effect of the
12 neutral practice is to fall more heavily, is to restrict
13 the employment opportunities of older workers because of
14 age, but says, even if that's true -- even if there is a
15 disparate impact because of age-- we are still entitled
16 to the defense because the practice itself is
17 reasonable.

18 It's also -- I would like to address the
19 suggestion that Griggs is directed -- or disparate
20 impact is directed at ferreting out intentional
21 discrimination. Certainly it serves that function in
22 many cases, but that's not the sole purpose of it. And
23 it's simply not the purpose of the prima facie case in
24 Wards Cove to give rise to an inference of intentional
25 discrimination, and the fact that it doesn't as strongly

1 in the age case I think isn't a reason to think that
2 Congress intended the courts to develop a different test
3 for showing what's otherwise prohibited under 4(a)(2).

4 And, finally, if I could address some of the
5 questions regarding what happened in this case. This
6 case, Justice Stevens, was not tried with reasonableness
7 in mind, both because Respondents abandoned their
8 "reasonable factor other than age" defense, which they
9 had raised as an affirmative defense in their answer. I
10 believe Mr. Waxman is incorrect when he suggests that
11 they in fact asked for instructions.

12 JUSTICE STEVENS: Well, if he put in all the
13 evidence he's described, that would not have proven
14 business necessity. It seems to me that evidence had to
15 go to the issue of reasonableness.

16 MR. RUSSELL: It may have been relevant to
17 reasonableness, but that's not why it was put in.
18 Before the trial began --

19 JUSTICE STEVENS: Was he arguing that it was
20 necessary to follow this one downsizing practice?

21 MR. RUSSELL: They certainly, I think --
22 they used that argument to show that they had a business
23 justification and to try to rebut our showing of
24 alternative, equally effective practices. But it was
25 clear by the time of trial that -- you know, they had

1 proposed jury instructions that didn't ask for
2 reasonableness to be part of the case. We proceeded
3 with the case on the assumption that we would be
4 entitled to prevail under these instructions so long
5 that we showed that the current practice, reasonable or
6 not, had a disparate impact and was subject to an
7 equally effective alternative.

8 JUSTICE STEVENS: And just one other detail,
9 Did -- the district judge not instruct the jury on this
10 defense?

11 MR. RUSSELL: It did not.

12 JUSTICE STEVENS: It did not?

13 MR. RUSSELL: The only instruction was that
14 we'd be entitled to prevail if we showed Wards Cove, and
15 its --

16 JUSTICE STEVENS: You have an unusual case
17 where the decisive issue, at least when you get to this
18 Court, is something the jury never passed on.

19 MR. RUSSELL: Well, I think that's right.
20 And ordinarily I think you would say that the
21 defendants, by not raising the issue to the jury, if
22 it's an affirmative defense, have waived it. They ask
23 for an excuse, given the change in law. We don't think
24 that the change in law excuses their failure to waive
25 it. The regulation that they point to they themselves

1 have argued here isn't entitled to much of any
2 deference. And, in fact, at the same time they were
3 simultaneously arguing that there wasn't even any
4 disparate-impact liability in the first place under the
5 ADEA. So I don't think they can actually claim that
6 they were relying on that.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 The case is submitted.

10 (Whereupon, at 12:15 p.m. the case in the
11 above-entitled matter was submitted.)

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<p>A</p> <p>abandoned 52:7</p> <p>able 38:1,12</p> <p>above-entitled 1:14 54:11</p> <p>abrogated 25:15</p> <p>absence 47:12</p> <p>absent 6:17 10:8</p> <p>accept 43:3</p> <p>access 13:21</p> <p>accident 36:7</p> <p>accommodated 14:2</p> <p>account 7:16 10:4 43:18</p> <p>accountant 38:13</p> <p>achieve 39:24</p> <p>achieved 46:16</p> <p>acknowledge 7:12 32:16 33:9</p> <p>acknowledged 41:18 48:23</p> <p>acknowledges 49:16</p> <p>Act 3:14 10:19 10:20,23 17:4 23:8,11 29:11</p> <p>action 4:8 16:24 19:6 28:25 29:1 30:17 37:10</p> <p>activities 17:25</p> <p>actual 4:12</p> <p>Adams 16:16</p> <p>adding 26:6</p> <p>addition 11:18</p> <p>additional 17:5</p> <p>address 15:11 16:2 17:1 35:21 51:18 52:4</p> <p>addressed 7:22 21:18</p> <p>addresses 15:24 21:16</p>	<p>addressing 15:17 50:4</p> <p>ADEA 7:21 17:18 20:7,9 28:20 29:17 30:11 54:5</p> <p>adequate 10:1</p> <p>adjusted 7:23</p> <p>admit 33:15,22 35:16 36:7,7 36:10,14 37:4 37:4</p> <p>admits 51:11</p> <p>admitting 33:23 34:2</p> <p>adopt 30:24</p> <p>advance 47:14</p> <p>adverse 16:10 20:19 21:1,4 21:12,16,22 26:13,13 28:24 37:10 38:6</p> <p>adversely 20:23</p> <p>affirm 45:7</p> <p>affirmance 48:20</p> <p>affirmative 6:17 6:19 8:13 9:24 12:17,25 13:4 17:20,23 18:11 19:6 32:16 33:12,15 49:9 49:10 52:9 53:22</p> <p>affirmed 45:17 49:1,18,19</p> <p>aftermath 15:23</p> <p>age 3:13,13,24 3:25 4:11,13 5:16,19 7:6,9 7:14,17,24 8:3 8:7,8,19,20,23 9:2,7,9,12,17 9:21 10:2,21 11:3,14,17 14:4 17:22 18:5 20:1,2,7,9</p>	<p>20:15,24 21:25 22:9,20 26:4 26:20 28:17,23 28:25 29:2,11 29:20,25 30:6 30:8,8,22 32:12 34:3,13 35:5,24 36:6,8 36:17 37:7,10 37:12 38:10 40:1 42:7,13 43:5,12,15,18 43:25 46:12,19 46:24 47:6,16 48:3,5,8,14 49:15 50:9,12 50:15,25 51:9 51:14,15 52:1 52:8</p> <p>agency 16:18 24:22,24</p> <p>agency's 25:9</p> <p>agree 6:9 16:13 36:17 39:8</p> <p>agreed 7:25</p> <p>agrees 3:12 26:14,15</p> <p>ahead 40:16</p> <p>AKA 1:8</p> <p>AL 1:4,9</p> <p>Alito 8:5,10 16:4 20:6 28:16 50:18</p> <p>allegations 33:16,22</p> <p>allow 31:21</p> <p>alternative 3:24 4:1,2 5:18 45:6 52:24 53:7</p> <p>alternatives 4:5 4:18 5:12</p> <p>ambiguous 15:7</p> <p>amendments 30:6</p> <p>Americans 23:11</p> <p>amicus 1:22 2:6</p>	<p>17:14</p> <p>analysis 9:14 11:2 30:14,15 41:16 48:6</p> <p>answer 3:21 4:22 14:9 17:8 40:23,23,24 48:2 49:14 52:9</p> <p>appeal 19:9</p> <p>appeals 42:2 45:17,20,20,22 45:24</p> <p>APPEARAN... 1:17</p> <p>appears 18:10 34:12</p> <p>appendix 20:22 44:14</p> <p>applied 27:13</p> <p>applies 5:3 17:24 32:13 38:19,20 43:14 49:18,20</p> <p>apply 6:6 28:4 30:6 42:11</p> <p>approved 41:14</p> <p>approximated 43:21</p> <p>April 1:12</p> <p>area 16:4</p> <p>argue 16:7</p> <p>argued 54:1</p> <p>arguing 29:16 34:4 52:19 54:3</p> <p>argument 1:15 2:2,10 3:3,7 13:23 15:13 17:12 18:18 27:5,9 33:10 33:20,21 45:6 50:1 52:22</p> <p>argument's 32:15 33:10</p> <p>arises 6:2</p> <p>art 15:20 16:10</p>	<p>24:12,13</p> <p>articulate 39:2</p> <p>asked 16:22 28:16 48:4 52:11</p> <p>aspect 4:17</p> <p>assertedly 43:4</p> <p>assertion 37:7 43:3 50:6</p> <p>Assistant 1:20</p> <p>assume 12:6 19:16</p> <p>assumes 33:21</p> <p>assuming 44:14 46:1</p> <p>assumption 53:3</p> <p>astounding 42:16</p> <p>Atomic 1:7 3:4</p> <p>attention 42:4</p> <p>Auer 23:17 24:12,18,21 25:3,9,11</p> <p>authority 16:25 17:2,3,7 18:23 23:20 24:5</p> <p>auto 38:15,15</p> <p>available 5:18 7:19</p> <p>avoidance 29:6</p> <p>aware 13:9 19:5</p> <p>a.m 1:16 3:2</p> <p>B</p> <p>B 1:3 33:3</p> <p>back 29:9 38:12 42:10,13 45:2 50:5</p> <p>background 17:19</p> <p>balance 43:21</p> <p>balance-shifting 27:14</p> <p>bar 8:2</p> <p>based 8:7 11:13 18:4 20:6,14 21:8 29:1 50:9</p>
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